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No. 08-1098

IN THE

# Supreme Court of the United States

RICHARD MADSEN and NANCY MADSEN,

*Petitioners,*

*v.*

JP MORGAN CHASE BANK, N.A.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Whether Petitioners' desire to send "a stern warning to lawyers and judges, throughout the land, that issues of federal preemption should be heard in the beginning of a case, and not delayed until the middle or the end of the case" presents a compelling reason to grant the Petition.

Whether Petitioners have presented a compelling reason to grant the Petition when no conflict exists between the Utah Supreme Court decision disposing of Petitioners' state law claim on grounds of federal preemption, and the earlier decision of the United States Court of Appeals for the Tenth Circuit which remanded the case to state court for lack of federal question jurisdiction.

## CORPORATE DISCLOSURE STATEMENT

Respondent JP Morgan Chase Bank, N.A., the successor in interest to Washington Mutual Bank, fsb, has the following parent corporation: JP Morgan Chase Co. JP Morgan Chase Co. is the only publicly held company that owns 10% or more of the stock of JP Morgan Chase Bank, N.A.

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## INTRODUCTION

The Petition should be denied because it presents no compelling reason to grant a Writ of Certiorari.

Petitioners primarily argue that certiorari should be used to "give a stern warning to lawyers and judges, throughout the land" that federal preemption issues should be raised at the beginning of a case. However, the preemption issues were, in fact, raised throughout this case, and in any event, Petitioners have not presented any compelling reason why certiorari should be used for this purpose. Second, contrary to Petitioners' argument, the Tenth Circuit Court of Appeals' 1980 decision in this case does not conflict with the Utah Supreme Court's 2008 decision in this case, and therefore there is no conflict for this Court to resolve.

In addition, the issues raised by this case are not likely to recur or have significance beyond this case. Petitioners' claim relates to mortgage payments made from 1971 (four years before this suit was filed) and 1979 (when state legislation was enacted). The form of trust deed on which this claim is based has not been used by Prudential since 1973. Petitioners' claim was dismissed by the Utah Supreme Court based on federal regulations in effect in the 1970s, which have since been amended. The Utah Supreme Court's ruling is correct and based on the unique facts of this case. Petitioners' contention that the ruling is incorrect is not a compelling reason to grant certiorari. In any event, the issues raised are not likely to recur or have relevance beyond this case. Thus, there is no compelling reason to grant certiorari.

## STATEMENT OF THE CASE

1. In 1975, Nancy and Richard Madsen ("Madsens")[1] sued Prudential Federal Savings & Loan Association ("Prudential")[2] seeking to recover interest or earnings on amounts paid into a reserve account (or budget account) maintained to pay taxes and insurance on the property securing their mortgage loan owed to Prudential.

2. In 1976, the trial court granted Prudential's Motion for Summary Judgment dismissing Madsens' claims, and denied Madsens' Motion for Partial Summary Judgment.[3]

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1. Richard Madsen died during the pendency of this case and the trial court modified the case caption to reflect Nancy Madsen as plaintiff. As was the practice in the lower courts, Respondent will continue to refer to the Petitioner in the plural as "Madsens."

2. Prudential was eventually acquired by Washington Mutual Bank, fsb, and the trial court modified the case caption to reflect Washington Mutual as the successor to Prudential. Petitioners have identified the Respondent as JP Morgan Chase Bank, N.A. As has been the practice in the lower courts, Respondent will continue to refer to the Respondent as Prudential.

3. In the mid-1970's, numerous cases were filed throughout the country seeking interest on mortgage loan reserve accounts. The overwhelming majority of reported decisions rejected the various theories presented by the plaintiffs. *See, e.g., Gibson v. First Fed. Sav. & Loan Ass'n*, 364 F. Supp. 614 (E.D. Mich. 1973), *aff'd*, 504 F.2d 826 (6th Cir. 1974); *Stavrides v. Mellon Nat'l Bank*, 353 F. Supp. 1072 (W.D. Pa. 1973), *aff'd*, 487 F.2d 953 (3d Cir.

(Cont'd)

3. Madsens appealed, and the Utah Supreme Court reversed and remanded. *See Madsen v. Prudential Fed. Sav. & Loan Ass'n*, 558 P.2d 1337 (Utah 1977) (hereafter "*Madsen I*"). (Appendix F to Petition for Writ of Certiorari.)

4. In 1977, after remand, Madsens filed their Second Amended Complaint. Prudential asserted federal preemption as a defense and removed the case to the United States District Court for the District of Utah.

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(Cont'd)

1973); *Manchester Gardens, Inc. v. Great West Life Assurance Co.*, 205 F.2d 872 (D.C. Cir. 1953); *Umdenstock v. Am. Mortgage & Inv. Co.*, 363 F. Supp. 1375 (W.D. Okla. 1973); *Zelickman v. Bell Fed. Sav. and Loan Ass'n*, 275 N.E.2d 300 (Ill. App. Ct. 1971); *Brooks v. Valley Nat'l Bank* ("*Brooks I*"), 539 P.2d 958 (Ariz. Ct. App. 1975), *vacated, Brooks v. Valley Nat'l Bank* ("*Brooks II*"), 548 P.2d 1166 (Ariz. 1976); *Surrey Strathmore Corp. v. Dollar Sav. Bank of New York*, 325 N.E.2d 527 (N.Y. 1975); *Richman v. Security Sav. & Loan Ass'n*, 204 N.W.2d 511 (Wis. 1973); *Durkee v. Franklin Sav. Ass'n*, 309 N.E.2d 118 (Ill. App. Ct. 1974); *Yudkin v. Avery Fed. Sav. Loan Ass'n*, 507 S.W.2d 689 (Ky. Ct. App. 1974); *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F. Supp. 975 (E.D. Pa. 1973); *Petherbridge v. Prudential Sav. & Loan Ass'n*, 79 Cal. App. 3d 5059 (Cal. Ct. App. 1978); *Kronisch v. Howard Sav. Inst.*, 392 A.2d 178 (N.J. Super. Ct. App. Div. 1978); *Tierney v. Whitestone Sav. & Loan Ass'n*, 373 N.Y.S.2d 724 (N.Y. App. Div.1975); *Tucker v. Pulaski Fed. Sav. & Loan Ass'n*, 481 S.W.2d 725 (Ark. 1972); *Cale v. Am. Nat'l Bank*, 370 Ohio Misc. 56 (1973); *Carpenter v. Suffolk Franklin Sav. Bank* ("*Carpenter II*"), 346 N.E.2d 892 (Mass. 1976). *Kronisch*, *Carpenter II* and *Brooks II* summarize the history of the litigation at that time. *But see Derenco v. Benjamin Franklin Fed. Sav. & Loan Ass'n*, 557 P.2d 427 (Ore. 1978) and *Madsen v. Prudential Fed. Sav. & Loan Ass'n*, 558 P.2d 1337 (Utah 1977).

5. On April 19, 1979, the United States District Court for the District of Utah granted summary judgment in favor of Prudential, dismissing Madsens' claims on the basis that federal regulations preempted Madsens' state law claim for interest on the reserve account.

6. Madsens appealed the federal court ruling. On appeal, the Tenth Circuit Court of Appeals reversed and remanded, not on the merits but solely for lack of federal jurisdiction because a "federal question" was not presented on the face of the complaint but existed only as a defense. Prudential filed a Petition for Writ of Certiorari to review this decision and Madsens objected to the Petition. The Petition was denied. *See Madsen v. Prudential Fed. Sav. & Loan Ass'n*, 635 F.2d 797 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981) (hereafter "*Madsen II*"). (Appendix E to Petition for Writ of Certiorari.)

7. After remand to the state court, Madsens filed their Substitute Third Amended Complaint (Class Action) (the present complaint) on October 14, 1981. The complaint alleged claims of unjust enrichment and accounting, fraud and statutory damages. The complaint did not allege a breach of contract claim.

8. In 1985, on the eve of trial, the trial court denied Prudential's motion for summary judgment which argued that Madsens' claims were preempted by federal regulations.

9. In 1985, trial was held on Madsens' individual claim only, with all class issues being reserved.

10. On March 22, 1990, the trial court entered Findings of Fact and Conclusions of Law on Madsens' individual claim only. Madsens were awarded damages of $134.70, plus interest at 10% per annum from the date of trial to the entry of judgment. The court fixed the damage recovery period from March 3, 1971 (four years before the complaint was filed) to June 30, 1979 (the date after which Utah Code Ann. §§ 7-17-1 to -10 became effective and the date on which Prudential no longer required reserve payments on most trust deeds, including Madsens'). (Appendix C to Petition for Writ of Certiorari.) By Memorandum Decision dated January 30, 1998, the trial court ruled that the granting of interest from the date of the trial to the date of entry of judgment was erroneous.

11. From December 1996 (when the judge who presided over the trial retired) to June 2006 (the time of entry of final judgment as to the class), Madsens filed numerous motions, including over thirty motions challenging the class definition, challenging the damages calculation, seeking to expand the damages period adopted by the trial court, or seeking removal of the Special Master, all of which were denied.

12. From December 1996 to the time of entry of final judgment, Madsens filed nine petitions for interlocutory appeal or writs of mandamus, all of which were denied.

13. Final judgment was entered in this matter on June 1, 2006. Madsens filed a Notice of Appeal on June 28, 2006. Prudential filed its Notice of Cross Appeal on July 12, 2006.

14. On September 23, 2008, the Utah Supreme Court reversed the trial court and dismissed Madsens' claim on the grounds that federal regulations governing Prudential preempted Madsens' state law claim for unjust enrichment and accounting. *See Madsen v. Washington Mut. Bank, fsb*, 199 P.3d 898 (Utah 2008) (hereafter "*Madsen IV*"). (Appendix A to Petition for Writ of Certiorari.)

## REASONS FOR DENYING THE PETITION

## THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO COMPELLING REASON TO GRANT REVIEW.

Rule 10 of the Rules of the Supreme Court of the United States provides that a "petition for a writ of certiorari will be granted only for compelling reasons." In the present case, the Petition should be denied because there is no such compelling reason.

First, Madsens state that certiorari should be granted "so that this Court can give a stern warning to lawyers and judges, throughout the land, that issues of federal preemption should be heard in the beginning of a case, and not delayed until the middle or the end of the case." (Petition at 7) (emphasis omitted.) However, the desire to give "lawyers and judges" a "stern warning" about the timing of issues in a case is not a "compelling reason[]" to grant certiorari. Second, contrary to Madsens' assertion, the 1980 decision of the Tenth Circuit Court of Appeals in this case does not conflict with the 2008 decision of the Utah Supreme Court.

For these reasons, this Court should decline to exercise its discretionary power to accept this case for review, as it does not present any compelling issue that might be worthy of review by the United States Supreme Court. Each of these points is addressed in turn.

### A. Certiorari is Not Necessary to Send a Message to "Lawyers and Judges" About Managing Cases.

Madsens' primary argument in support of their Petition is that "certiorari should be granted, so that this Court can give a *stern warning* to lawyers and judges, throughout the land, that issues of federal preemption should be heard in the beginning of a case, and not delayed until the *middle* or the *end* of the case." (Petition at 7.) However, giving a "stern warning" about how a case should proceed simply is not a compelling reason to grant certiorari. In any event, federal preemption issues were raised and heard at early stages in this proceeding. (*See* Statement of the Case *supra* at ¶¶ 5 and 8.) Final ruling on the issue of federal preemption necessarily occurred on final appeal, after entry of judgment on all issues.

More importantly, this case presents no compelling reason for review because the case relates to mortgage payments made in the 1970s, involving mortgage forms no longer in use and regulations since amended.[4] Thus,

4. The 1975 federal regulation which governs the escrow payments made in this case in the 1970s, then found at 12 C.F.R. § 545.6-11 (1976), was recodified in 1979 at 12 C.F.R. § 548.3 (1979), and then substantially amended in 1983 as a result of the Garn-St. Germain Depository Institutions Act of 1982. *See* 48 Fed. Reg. 23032 (May 23, 1983).

the issues are not likely to recur or have significance beyond this case. *Cf. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (granting certiorari because "the issue is significant and likely to recur"). Further, this case does not involve any issue of general importance, *cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 289-90 (1979) (granting certiorari because of a conflict in the circuits "and the general importance of these . . . cases"), nor does it involve a conflict among circuits, *cf. Dean v. United States*, No. 08-5274, 2009 WL 1138892, at *2 (U.S. Apr. 29, 2009) (granting certiorari "to resolve th[e] conflict" among Circuits). *Cf. also Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (granting certiorari "to resolve a division in the Circuit Courts on the reach of [a federal statute]"); *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (granting certiorari "to resolve the disagreement among the Court of Appeals on a question of national importance . . .").

### B. The Ruling of the Utah Supreme Court (*Madsen IV*) Does Not Conflict with the Ruling of the Tenth Circuit (*Madsen II*).

Madsens' Petition asserts that there is a conflict between the ruling of the United States Court of Appeals for the Tenth Circuit ("*Madsen II*") and the final ruling of the Utah Supreme Court ("*Madsen IV*"). There is no such conflict.

Madsens erroneously argue that the Tenth Circuit Court of Appeals in *Madsen II* "concluded that there was a contract," while the "Utah Supreme Court concluded that there was no contract." (Petition at 8.)

This is incorrect. The Tenth Circuit held that no federal question jurisdiction existed, and therefore reversed summary judgment that had been granted in Prudential's favor. The Tenth Circuit did not rule on the substance of Madsens' claim or any of Prudential's defenses. *See Madsen v. Prudential Fed. Sav. & Loan Ass'n*, 635 F.2d 797, 801 (10th Cir. 1980) ("*Madsen II*"). The Utah Supreme Court ruled that Madsens' claim for unjust enrichment and accounting was barred by federal regulations. *See Madsen v. Washington Mut. Bank, fsb*, 199 P.3d 898, 905-07 (Utah 2008) ("*Madsen IV*").

In any event, the assertion in Madsens' Petition that either *Madsen II* or *Madsen IV* made erroneous factual findings or misapplied the law is not a compelling reason for review. *See* United States Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

### 1. The Tenth Circuit (*Madsen II*) held that no federal question jurisdiction existed.

After the first appeal in this case in 1977 in which the Utah Supreme Court remanded the case to the trial court, Madsens amended their complaint. Thereafter, Prudential removed the case to federal court, alleging that the relief requested arose under and was controlled by preemptive federal law. Madsens moved to remand the case based on a lack of federal question jurisdiction. The United States District Court for the District of Utah denied the Madsens' motion to remand and granted summary judgment in Prudential's favor on the basis of preemption. On appeal, Madsens argued that

the federal court lacked jurisdiction. The Tenth Circuit reversed, and remanded the case to state court based on a lack of federal question jurisdiction. *Madsen II* at 799-800.

The issue at the Tenth Circuit was whether the federal court had jurisdiction of the removed action. *Id.* at 800. The Tenth Circuit explained that for a cause of action to "arise under" federal law "the federal controversy must be 'disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.'" *Id.* at 800-01 (citations omitted). Thus, federal question jurisdiction existed, according to the Tenth Circuit, only if Madsens' complaint raised the federal question, not if Prudential's defenses raised a federal question. *Id.* at 801. Applying these principles, the Tenth Circuit found that there was no federal question jurisdiction, explaining:

> Although construction of the federal regulation cited by Prudential may be relevant to the defense Prudential asserts, *i.e.*, that section 545.6-11(c) does not require payment of interest, the meaning of the regulation is absolutely irrelevant to the Madsens' theory of recovery. Because the Madsens have predicated their suit upon rights created under state law, the fact that federal regulations may create a defense to recovery on such a claim is immaterial to a finding of federal question jurisdiction.

*Id.* at 801.

Thus, the Tenth Circuit decision in *Madsen II* did not reach the substance of any federal defense raised by Prudential, but rather expressly acknowledged that those defenses were yet to be heard.

Madsens argue that the statement by the Tenth Circuit in *Madsen II* that "state law is applicable in determining whether Prudential contracted to pay interest" is a holding by that court that a contract to pay interest existed. (Petition at 8.) This is not correct. The Tenth Circuit language cited by Madsens was

> presented in response to Prudential's argument that the controversy required the court to apply federal common law in determining whether the parties had entered into a contract for the payment of interest. . . . The passage cited by the Madsens is the Tenth Circuit's acknowledgment that under the explicit terms of 12 C.F.R. § 545.6-11(c), lenders' interest obligations could be varied by contract between private parties. The question of whether such a private contract had been created is, as the Tenth Circuit concluded, governed by state law.

*Madsen IV* at 906-07.

Therefore, the Tenth Circuit in *Madsen II* did not hold that a contract to pay interest existed, but rather dismissed for lack of federal question jurisdiction, and in doing so, stated that state law contract issues, and federal preemption defenses, were yet to be decided.

As a result, Madsens are incorrect in asserting that the Tenth Circuit "concluded that there was a contract" (Petition at 8) and, hence, the Tenth Circuit's decision does not conflict with the decision of the Utah Supreme Court.

### 2. The Utah Supreme Court (*Madsen IV*) correctly held that Madsens' claim is barred by federal regulations in effect at the time Madsens' claim arose.

The Utah Supreme Court correctly held that no contract existed for the payment of interest and thus Madsens' claims are barred by federal regulations governing Prudential (as a federal savings and loan association). The specific regulation in effect at the relevant time provided that, except as provided by statute or by contract, a federal association "shall have no obligation to pay interest on escrow accounts." *Madsen IV* at 904 (*citing* 12 C.F.R. § 545-6-11(c)). Under that regulation, Prudential had no obligation to pay interest on the Madsens' mortgage escrow account because no contract requiring the payment of interest existed.

Madsens' claim was not for breach of contract, but rather for "Accounting and Unjust Enrichment." Indeed, Madsens' complaint does not allege a written contract to pay interest, but rather argues the effect of a common law pledge. The 1977 decision in *Madsen I* confirmed that the Madsens' claim is not based on a contract, but rather that it "is predicated on the theory that the monthly budget payments . . . constitute a common law pledge." *Madsen I* at 1339.

That common law pledge, if it existed, arose out of pledge language contained in the trust deed used by Prudential for Madsens' loan, but that trust deed "did not contain any provision requiring Prudential to pay interest or profits on the budget payments." *Madsen IV* at 900. Rather, "Madsens argued that Prudential was unjustly enriched because the budget payments were held as a pledge and the common law required Prudential, as pledgee, to account for any profits earned through the use of the pledge." *Id.* As the Utah Supreme Court correctly explained, "[i]n this case, however, the Madsens have not claimed that a provision of the contract obligated Prudential to pay interest. Indeed, there is no such provision." *Id.* at 907.

Based on the then applicable regulations, and Madsens' claim, the Utah Supreme Court correctly concluded that "Prudential had no obligation to pay interest to the Madsens absent a state statute or contractual obligation to the contrary. The Madsens' accounting claim is not founded on a contract or statute." *Id.* at 904.

Thus, Madsens did not allege a written contract to pay interest, but rather argued the effect of a common law pledge, and there is no inconsistency between the decision of the Tenth Circuit in *Madsen II* and the decision of the Utah Supreme Court in *Madsen IV*.

### C. The Ruling of the Utah Supreme Court Does Not Conflict with *Altria*.

Finally, Madsens incorrectly argue that the Utah Supreme Court's decision in *Madsen IV* conflicts with *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008), because, Madsens contend, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." (Petition at 9, 10.) However, Madsens fail to identify any express preemption clause applicable to this case that could be "susceptible of more than one plausible reading." Instead, Madsens argue only that there is a factual conflict between *Madsen II* and *Madsen IV* (which is incorrect, as explained above). (Petition at 10.) The decision in *Madsen IV* was not based on the reading of an express preemption clause. Rather, as explained by the Utah Supreme Court in *Madsen IV*, under the Supremacy Clause of the United States Constitution, federal law preempts state law "where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively" or "to the extent that it actually conflicts with federal law." *Madsen IV* at 903 (*quoting English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)). Thus, in *Madsen IV*, the Utah Supreme Court held that federal regulations in existence in 1975 state that Prudential was not required to pay interest on the mortgage loan reserve account, and these "regulations directly conflict with Madsens' state law claim" and therefore the state law claim for interest is preempted. *Madsen IV* at 904. Thus, the ruling in *Madsen IV* does not implicate *Altria*.

## CONCLUSION

This case presents no compelling reason for further review and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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